In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-740

OVERTON THIERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a portion of the prosecutor's closing argument constituted reversible error because it impermissibly strengthened the credibility of a government witness.

Petitioner was indicted for corruptly influencing, obstructing, impeding and endeavoring to influence, obstruct, and impede the administration of justice and conspiring to give false testimony, in violation of 18 U.S.C. 1503 and 1623. Petitioner was also charged with corruptly endeavoring to obstruct justice by causing a witness to testify falsely, in violation of 18 U.S.C. 1503. Petitioner was convicted[1] as charged after a jury trial

---

[1]Henry Joshua was a co-defendant in the same trial and Nolan James was an unindicted co-conspirator. Joshua was convicted and sentenced to three concurrent three-year terms of imprisonment.

in the United States District Court for the Eastern District of Louisiana and was sentenced to two concurrent three-year terms of imprisonment. The court of appeals affirmed (Pet. App. A).

Evidence introduced at petitioner's trial revealed that petitioner, an attorney, was originally retained to represent Nolan James on a charge of armed robbery (Tr. 193-196). James testified at petitioner's trial that he had told petitioner during their first meeting that he and two other men had been fishing on the day of the robbery but that he could not remember the names of either of his companions (Tr. 197-200). He further testified that he had told petitioner repeatedly during several subsequent meetings at the New Orleans House of Detention, where he was incarcerated awaiting trial, that he did not know anyone in New Orleans whom he could ask to act as an alibi witness at his trial. Petitioner finally told James that "he'd take care of it" (Tr. 201).

Shortly before James' trial, petitioner visited him at the House of Detention with Henry Joshua and informed him that Joshua would act as his alibi witness (Tr. 201). In petitioner's presence, James and Joshua then fabricated a story that Joshua ultimately told at James' trial (Tr. 209-211, 216-217). James testified that he had never heard of Joshua prior to the time petitioner brought him to the House of Detention (Tr. 208-209). Petitioner, on the other hand, admitted in his petition that "Henry Joshua [was] an acquaintance of [his] who sometimes performed various functions for [him]" (Pet. 8).

John May testified at petitioner's trial that he was in the same cell with James in the New Orleans House of Detention and that prior to James' trial James had told him that petitioner "wanted to hire some fellow to give him an alibi to say that he had went fishing at the time of the robbery" (Tr. 425-427). May imme-

diately told the prosecutor and agents of the Federal Bureau of Investigation of James' and petitioner's plans (Tr. 430).

May had not been called by the government to testify at James' trial. One aspect of petitioner's strategy at his own trial was to argue that, had May told the authorities of a plan to commit and to suborn perjury, May would have been called by the government at James trial in rebuttal (Pet. 9). In his closing argument at petitioner's trial, the prosecutor stated (Tr. 740-741):

> We also presented to you the testimony of John May, and you have seen his statements. John May was himself and is in custody for bank robbery serving ten years. John May, and the sole purpose of that testimony, as his Honor indicated to you, is to show that Nolan James did in fact make these statements before counsel stated he had a motive to make them, but John May told me and agents of the F.B.I. almost a full month before the trial that Nolan James had told him that his attorney was procuring alibi witnesses for him for some seven thousand dollars.

The defense immediately objected, and the trial court cautioned the jury (Tr. 741):

> Ladies and gentlemen, you must disregard anything that the U.S. Attorney says about anything that he has participated in in this regard and just regard only the evidence as you have heard it from the witness stand. The U.S. Attorney, of course, is not a witness and is not under oath, and you should disregard everything he says in this argument, as I told you at the outset, because what he says in the argument is not testimony at all, it's an attempt to persuade you.

Petitioner contends that the portion of the prosecutor's closing argument quoted above was reversible error because it impermissibly supported the credibility of a government witness. In his closing argument, the prosecutor may discuss the evidence, any warrantable inferences stemming from that evidence, the witnesses, and their credibility. In *Gradsky* v. *United States,* 373 F. 2d 706, 710 (C.A. 5), the court held that in testing the propriety of the prosecutor's closing argument, a court must determine whether any statement that is made might reasonably lead the jury to believe that the prosecutor's comments are based in part on evidence that has not been introduced at trial. While it is true that the prosecutor may not attempt to bolster the credibility of a witness by implying that all relevant facts are not before the jury, *Hall* v. *United States,* 419 F. 2d 582, 586 (C.A. 5); *Dunn* v. *United States,* 307 F. 2d 883 (C.A. 5), that did not occur in this case.

On direct examination, John May testified that he told the prosecutor and agents of the F.B.I. about James' statement to him that petitioner was planning to procure an alibi witness (Tr. 427, 430). Petitioner did not object to this testimony, and had every opportunity to cross-examine May. In his closing argument, the prosecutor did nothing more than reiterate the substance of May's testimony and comment upon its importance (Tr. 740-741). Accordingly, petitioner was not unfairly prejudiced by the prosecutor's closing statement. See *United States* v. *Davis,* 487 F. 2d 112, 124-125 (C.A. 5), certiorari denied, 415 U.S. 981.[2]

---

[2]Petitioner's reliance upon *Turner* v. *Louisiana,* 379 U.S. 466, is misplaced. The defendant in *Turner* was on trial for murder, and during the course of the trial the jury was sequestered. Two deputy sheriffs who were assigned to escort the jurors to their meals and to run errands for them testified for the government against the defendant. This Court held that the confidence reposed in the two government witnesses, who were also the jurors' "guardians" during

Even if it is assumed that the prosecutor's comment was error, moreover, the trial court's admonition to the jury that the prosecutor's closing argument was not to be regarded as evidence, and to consider only the evidence presented at trial in reaching a verdict, made the error harmless beyond a reasonable doubt. *United States* v. *Dupart*, 483 F. 2d 1393, 1395 (C.A. 5), certiorari denied, 415 U.S. 984; *United States* v. *Roberts*, 481 F. 2d 892, 895 (C.A. 5). See also *Harrington* v. *California*, 395 U.S. 250, 254; *Chapman* v. *California*, 386 U.S. 18, 22-24.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

---

the trial, impermissibly enhanced their credibility. 379 U.S. at 473. This Court emphasized that the testimony of the two sheriffs "was not confined to some uncontroverted or merely formal aspect of the case for the prosecution" (*ibid.*), but was the principal testimony presented on behalf of the government.

John May was not the principal witness for the government at petitioner's trial, and his testimony only corroborated the testimony of the government's chief witness, Nolan James. The prosecutor did little more in the present case than restate May's testimony. A reiteration of testimony already in evidence cannot be equated with the conduct proscribed in *Turner*.